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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAVID H. LUCAS,
Petitioner,
vs.
SOUTH CAROLINA COASTAL COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The National Association of Home Builders (NAHB) and the International Council of Shopping Centers, Inc. (ICSC) have received the written consent of the parties to file this brief as *Amici Curiae* in support of the Petitioner and have filed the letters of consent with the Clerk of this Court.

INTERESTS OF *AMICI CURIAE*

The NAHB represents 153,000 builder and associate members organized into approximately 850 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The Just Compensation Clause and its implementation as a shield against oppressive governmental land use regulation is of paramount importance to the NAHB. The actual availability of compensation for the occasional statute or ordinance that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with governmental requirements that fail to substantially advance legitimate governmental interests. The former type of governmental action is before the Court in this case.

The NAHB has been before this Court as an *amicus curiae* or as of counsel on behalf of the property owner in prior takings cases involving land use regulations. (*Nollan v. California Coastal Commn.*, 483 U.S. 825 [1987]; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 [1987]; *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 [1986]; *Williamson County*

Reg. Plan. Commn. v. Hamilton Bank, 473 U.S. 172 [1985]; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 [1981]; *Agins v. City of Tiburon*, 447 U.S. 255 [1980]) Indeed, the NAHB's brief was cited approvingly in this Court's *Nollan* opinion, 483 U.S. at 840.

The ICSC is a not-for-profit corporation that has approximately 24,000 members worldwide and approximately 22,000 in the United States. ICSC is the trade association for the shopping center industry. Its members, including developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. It represents almost all of the 37,000 shopping centers in this country and is the only U.S. trade association specific to shopping centers.

ICSC's members have a clear interest in the disposition of the present case because the holding of the Supreme Court of South Carolina, if affirmed by this Court, would substantially impair the value of many members' property by eliminating reasonable expectations of development rights.

These *amici*'s joint interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on Constitutional guarantees. As Justice Brandeis insightfully admonished:

> "Experience should teach us to be most on our guard to protect liberty when government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." (*Olmstead v. U.S.*, 277 U.S. 438, 479 [1928] [Brandeis, J., dissenting])

SUMMARY OF ARGUMENT

Ends and means. As is so often the case in constitutional litigation, that is what this case is about.

The South Carolina Coastal Council and the South Carolina Supreme Court focus on the ends sought to be achieved by prohibiting home construction near the coast. They argue as though recognition of that "good" is the end of the inquiry.

However, this Court's consistent jurisprudence makes clear that recognition of a proper governmental goal is only the beginning of the inquiry; it is not the end. (E.g., *Kaiser Aetna v. U.S.*, 444 U.S. 164, 174 [1979]; *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 419, 425 [1982].) For, if the governmental action is not in pursuit of a legitimate goal, then the action would be *ultra vires* and invalid without more. Once a valid goal is recognized, the means chosen to obtain that goal must be subjected to constitutional scrutiny to determine whether the rights of those injured in the process have been adequately protected:

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones." (*Stanley v. Illinois*, 405 U.S. 645, 656 [1972]; footnote omitted.)[1]

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[1] See also *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *McNabb v. U.S.*, 318 U.S. 332, 347 (1943); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

South Carolina has cast its net too broadly. In its overriding concern to find a solution to a perceived problem, South Carolina forgot the rights of those whose property was to be sacrified for the perceived greater good. The Fifth Amendment's Just Compensation Clause was designed to afford protection in cases of such governmental oversight.

ARGUMENT

I. BACKGROUND: THE NEED FOR FAIRNESS IN LAND USE REGULATION

As the unified voice of the home building industry in America, the NAHB cannot let pass the central idea in the legislation before this Court, i.e., that there is something so nefarious about the building of a home that home construction can be condemned as a nuisance. At bottom, all that Mr. Lucas wanted to do was to build two homes on land which was of a type which had historically been so used. In an economic era when people find themselves compelled to seek large packing crates for shelter, there seems something oddly surreal in condemning the construction of homes as a nuisance which is so heinous that it can be prevented without any thought of compensating the landowner.

Home building is not evil. There are ways to build homes to ensure that they do not create problems for their neighbors. South Carolina, however, chose not to avail itself of the benefits of modern technology. Instead of a scalpel, it reached for an axe. It perceived a problem on its coast and sought to solve that problem by the simple expedient of precluding the construction of any homes.

That simplistic solution finds numerous counterparts in current land use regulations. Indeed, the problem — and its chief consequence, a rising lack of affordable housing — has become pervasive enough to result in yet another federal

government study, in the form of a report to President Bush and Housing Secretary Kemp. (Advisory Commn. on Regulatory Barriers to Affordable Housing, *"Not In My Back Yard": Removing Barriers to Affordable Housing* [1991] [hereafter cited as *NIMBY Report*])[2] Thus, before proceeding further, it seems appropriate to describe the regulatory climate in which it is possible for such draconian legislation to be enacted.

Developing land these days is not for the faint of heart. Nor is it any place for those short of stamina or economic staying power. The multi-tiered regulatory system facing property owners can be as daunting as it is bewildering, with [sometimes well-intentioned] regulatory bodies and their discrete regulations proliferating.[3] From every governmental office, bureau, department, board or commission, bureaucrats

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2 A report of the situation a decade ago, which had reached the same conclusions about the adverse effect of land use regulations on the affordability of housing, can be found in *Report of the President's Commission on Housing* 177-183 (J. Foote ed. 1982). The human cost of excessive regulation, in the sense of driving people out of the housing market, is hardly a secret aside from the governmental commissions. For a sampling of similar conclusions from varying sources, see, e.g., Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 Me. L. Rev. 29, 61 (1980); Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. Cal. L. Rev. 447, 462 (1981); Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 Sw. U.L. Rev. 435 (1983).

3 See, e.g., *Nimby Report* 8:

> "Numerous Federal, State, and local regulations that are intended to achieve specific, admirable goals turn out to have negative consequences for affordable housing. The impact on housing costs may not have been considered when the regulations were promulgated."

Although noted here in a 1991 report, this regulatory Balkanization has long roots. See Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 Me. L. Rev. 261 (1984); Krasnowiecki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980); Hagman & Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in the Land Markets*, 40 The Real Estate Appraiser 5, 7 (1974); Mandelker, *Managing Our Urban Environment* 19 (1966).

(often responding to no more than selfish demands of established neighborhood groups or single issue environmentalist constituencies)[4] issue a series of decrees that can, and often do, transform a desirable and well thought out plan of land development into an economically infeasible fiasco. On rare occasion, a court will come to the property owner's aid on particularly outrageous facts, but not with such reliability as to diminish the size of the risk of such enterprises. As the most recent study concluded:

> "Millions of Americans are being priced out of buying or renting the kind of housing they otherwise could afford were it not for a web of governmental regulations. For them, America — the land of opportunity — has become the land of a frustrating and often unrewarded search for an affordable home."[5]

Much of the unconcerned attitude on the part of the regulators was spawned during the 1980s, before this Court decided *First English*, and resolved the question (or so one would have thought) of the constitutional consequences of over-regulation.[6] Slowing the momentum and changing the

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4 *Nimby Report* 8; Babcock, *The Zoning Game* 141 (1966); Frieden, *The Environmental Protection Hustle* 8 (1979); Tucker, *Progress and Privilege: America in the Age of Environmentalism* (1982); Branch, *The Sins of City Planners*, 42 Pub. Ad. Rev. 1, 3 (1982).

5 *NIMBY Report* 3. Quantifying that generality, the report concludes that excessive regulation can add $15,000 to $30,000, or 25-30% to the cost of modest housing. (*NIMBY Report* 5)

6 Professor Richard Babcock, the dean of the American land use bar, has called overreaching governmental regulation (in which the regulators demand that which they know they are legally precluded from demanding but which they know their targets cannot afford the time or expense to challenge) "municipal leverage." (Babcock, *Foreword to Exactions: A Controversial New Source For Municipal Funds*, 50 Law & Contemp. Probs. 1, 2 [1987]) Aside from this Court's celebrated response in *Nollan v. California Coastal Commn.*, 483 U.S. 825, 837 (1987), in which this Court described such tactics as "extortion," some condemnatory judicial reactions can be found in *Collis v. City of Bloomington*, 246 N.W.2d 19, 26

(continued)

approach of those regulators has not been easy. The steady stream of petitions presented to this Court attests to that.

Coupled with the apparent judicial indecision over remedies has been the agony of determining whether a land use dispute is "ripe" enough to obtain the attention of the courts. While a complete discussion is plainly beyond the scope of this brief, suffice it to note that almost all regulatory taking complaints are met with a governmental defense that the case is not yet ripe, and a staggering number of those cases are resolved in the government's favor. (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report [July-Aug. 1988] 49, 53; emphasis added.) As one government lawyer expressed it, "[l]ike the vagueness of the three-factor analysis [for determining what is a taking], this [ripeness] requirement has historically worked to the advantage of government regulators." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400 fn. 71)

In apparent recognition of the difficulties facing property owners, this Court has repeatedly held that a property owner's reasonable, or distinct, investment-backed expectations merit Fifth Amendment protection against harsh regulatory interference.[7] In three of those decisions which

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(fn. continued)
(Minn. 1976) ["grand theft"]; *West Park Ave., Inc. v. Township of Ocean*, 224 A.2d 1, 4-5 (N.J. 1966) ["municipal lawlessness"]; *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981) ["extortion"].

7 *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264 (1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *United States v. Locke*, 471 U.S. 84 (1985); *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986);

(continued)

involved land use regulations, this Court measured the regulations against the property owner's ability to earn a profit or make a reasonable return on investment.[8]

That protection of reasonable expectations against undue regulatory interdiction supplies fairness to the process and provides incentives to property owners to become involved in the development process. Actions like South Carolina's, by contrast, which purport to extinguish reasonable expectations without compensation, are as counterproductive in the housing market as they are unconstitutional.

This Court was right to recognize the expectations interest as one which merits constitutional protection. By actually providing protection in the case at bench, this Court can demonstrate its adherance to the concept and let lower courts and regulatory entities know the seriousness of the protection to be accorded.

II. GOOD INTENTIONS ARE NO DEFENSE TO A FIFTH AMENDMENT VIOLATION

The explicit premise of the South Carolina legislation is that, if the end sought to be achieved by government regulation can be said to be virtuous, then there cannot be a Fifth Amendment violation.

That concept is foreign to this Court's jurisprudence. At its most basic, this Court has held that a taking occurs if a land use regulation *either* fails to substantially advance a legitimate state interest *or* denies the property owner economically viable use of his land. (E.g., *Agins v. City of*

(fn. continued)
Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987).

8 *Penn Central*, 438 U.S. at 136; *Williamson County*, 473 U.S. at 200; *Keystone*, 480 U.S. at 496, 501.

Tiburon, 447 U.S. 255 [1980]) Perforce, that means that a regulation effects a taking even if done for a legitimate purpose if its effect is to deny economically viable use to the owner.

When there is a taking, there must be compensation. A taking for public use without compensation violates the Fifth Amendment:

> ". . . government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 [1987]; emphasis added.)

If government enacts legislation which takes property and intends to provide no compensation, the legislation is invalid. (*Hodel v. Irving*, 481 U.S. 704 [1987])

Governmental power is not permitted to run roughshod over the constitutionally protected rights of individuals. That is what this Court was talking about when it concluded in *First English* that ". . . many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them." (482 U.S. at 321)

In so holding, *First English* continued a long line of this Court's decisions that the Fifth Amendment places a stern restriction on the exercise of all governmental power.

For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 419 (1982), the Court was faced with a statute designed to facilitate communication via cable television. The State of New York required landlords to permit the installation of cables on their property. The City of New York urged, and the state courts agreed, that the objective was a legitimate police power activity in the nature of regulation, and thus beyond constitutional challenge. This Court

reversed, concluding that recognition of a valid police power objective was only half the case. The other half of the case dealt with the means chosen to attain it:

> "The Court of Appeals determined that §828 serves the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects,' and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*" (458 U.S. at 425; emphasis added.)

The same conclusion appears in *Kaiser Aetna v. U.S.*, 444 US 164 (1979). There, the Army Corps of Engineers decreed that a private marina must be open to the public. The reason for this Court's disagreement is telling:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is *an entirely separate question.*" (444 U.S. at 174; emphasis added.)

See also *U.S. v. Security Industrial Bank*, 459 U.S. 70 (1982) [retroactive application of bankruptcy legislation is subject to the Fifth Amendment].[9]

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9 Among the early antecedents of this rule is *Delaware, L. & W.R. Co. v. Morristown*, 276 U.S. 192, 193 (1928):

> "But, assuming that under the circumstances the creation of the public hack stand would be a proper exertion of the police power, *it does not follow* that the due process clause of the 14th Amendment would not safeguard to the owner just compensation for the use of its property." (Emphasis added.)

In a similar vein, of course, are cases such as *Preseault v. ICC*, 494 U.S. 1 (1990), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). In each of them, this Court was faced with the claim that Congress, in pursuit of legitimate goals,[10] had taken private property in violation of the Fifth Amendment. In each, this Court directed the property owners to the U.S. Claims Court to determine whether these legitimate exercises of legislative power required compensation. Noble regulatory goals cannot override constitutional guarantees:

> "Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. . . . Thus, a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." (*United States Trust Co. v. New Jersey*, 431 U.S. 1, 29-30 [1977])

This consistent teaching probably explains why the Court of Appeals for the Federal Circuit, a body which hears all appeals from the Claims Court (the court which adjudicates more takings cases than any other because it is virtually the exclusive forum for takings cases against the United States), has had no trouble recognizing that the Just Compensation Clause operates against *proper* governmental action:

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10 Respectively, the preservation of rail transportation corridors, the registration of pesticides, the aftermath of the Iranian hostage crisis, and the provision of rail service to the Northeast United States.

> "In such cases the characteristic feature is the defendant's use of *rightful* . . . regulatory rights to control and prevent exercise of [private] ownership rights the defendant is unwilling to purchase and pay for."[11]

In *Berman v. Parker*, 348 U.S. 26 (1954) the government's right to condemn land for an urban renewal project was challenged. This Court had no question that the program was a rational governmental project and within the power of the legislative branch to decide to accomplish. Nonetheless, the transfer of property interests could not be done without just compensation. Likewise, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) involved Hawaii's right to use the eminent domain power to break up an oligopolistic form of land ownership by taking property from large landowners and transferring fee title to individuals. This Court did not question that the land redistribution was a rational governmental project. Nonetheless, the transfer of property interests could not be accomplished without just compensation.

The upshot of the governmental position at bench would be the elimination of the Just Compensation Clause. In its repeated analysis of the issue, this Court has consistently defined a regulatory taking in terms of three factors — diminution of the property's economic value, interference with distinct investment-backed expectations, and the character of the government's action (the latter primarily concerned with whether there has been a physical invasion of property rights). (E.g., *Penn Central Transp. Co. v. City of New York*,

11 *Florida Rock Indus., Inc. v. U.S.*, 791 F.2d 893, 899 (Fed. Cir. 1986). (Quoting with approval; emphasis, the Court's.) See also *Whitney Benefits, Inc. v. U.S.*, 926 F.2d 1169, 1177 (Fed. Cir. 1991); *Skaw v. U.S.*, 740 F.2d 932, 939 (Fed. Cir. 1984). For a sampling of other courts reaching the same conclusion, see *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1332 (9th Cir. 1977); *Mattoon v. City of Norman*, 617 P.2d 1347, 1349 (Okla. 1980); *Knight v. City of Billings*, 642 P.2d 141, 145-46 (Mont. 1982); *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 273 (Tex. Civ. App. 1975).

438 U.S. 104, 124 [1978].) All three of these factors relate only to the impact of the government's regulation on the individual's property interest. They have nothing to do with the legitimacy of the governmental goal. When inquiring whether a governmental regulation violates the Just Compensation Clause of the Fifth Amendment, the question is not the subject matter of the governmental regulation, but the impact on the private property owner. (E.g., *Kaiser Aetna*, 444 U.S. at 174.) Indeed, as this Court said long ago in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910), ". . . the question is, What has the owner lost?, not What has the taker gained?"[12]

Thus, regardless of South Carolina's good intentions in enacting this scheme, the Fifth Amendment prohibits the State from achieving its goals by the uncompensated seizure of private property development rights.

III. DEFINITIONAL *IPSE DIXIT* CANNOT CONTROL CONSTUTIONAL ADJUDICATION

The South Carolina Supreme Court relied on the idea that there is a "nuisance exception" to the constitutional command for compensation. No doubt the governmental briefs in this Court will do so as well.

Mr. Lucas' brief on the merits discusses the validity of the "nuisance exception" at length, and that argument will not be rehearsed here. However, in light of the clear authorities discussed above which preclude the defense of "good intentions," two things must be said about that "exception." First,

12 With due respect to good intentions, a substantial factor in the lack of affordable housing today has been "environmental" regulations:

> "Exerting considerable influence on both urban and suburban landscapes, otherwise valuable environmenal protection regulations seriously restrict the amount of buildable land that is available for development. This effect raises the cost of what land remains open for homebuilding." (*NIMBY Report* 6)

to the extent it has validity at all, it is a narrow exception to the general responsibility to compensate for property taken. Second, the agency drafting the regulatory restriction cannot be permitted to define its liability out of existence by the simple expedient of declaring something to be a nuisance.

A. The General Rule Requires Compensation; Any Exception Must be Truly Narrow

The "nuisance exception" is said to stem from this Court's decision in *Mugler v. Kansas*, 123 U.S. 623 (1887). Thus, the place to begin any inquiry into the meaning of that "exception" is in *Mugler*. There, this Court explained the limited nature of its holding:

> "The power which the States have of prohibiting such *use* by individuals of their property *as will be prejudicial* to the health, the morals, or the safety of the public, is not — and, consistent with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted *by a noxious use of their property, to inflict injury upon the community.*" (123 U.S. at 669; emphasis added.)

Thus, what this Court permitted in *Mugler* was the uncompensated prohibition of *a specific use* of property which *caused injury* to others. As the Court noted, "[s]uch legislation does not disturb the owner in the control or use of its property for lawful purposes . . . ." (123 U.S. at 669) That conclusion was reinforced in this Court's more recent discussion in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 488 (1987) which described *Mugler* and its progeny as applying to "... *activities* akin to a public nuisance." (Emphasis added.)

Neither in *Mugler*, nor any of its progeny, was there a *total* prohibition of use. A specific use was involved in each case. Although the regulations may have precluded the property owner's preferred use (even the property's most valuable use), it did not preclude all economically viable use.

Curtin v. Benson, 222 U.S. 78 (1911), another case decided in that same era, makes it clear that *Mugler* was not intended to grant *carte blanche* to government agencies to regulate private property into oblivion. As this Court put it in *Curtin*:

> "On the merits of the case we may concede, *arguendo*, as contended by the [governmental] appellees and disputed by appellant [property owner], that the United States may exercise over the park not only rights of a proprietor, but the powers of a sovereign. There are limitations, however, upon both. *Neither can be exercised to destroy essential uses of private property.* The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? . . . [The government's] *order is not . . a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use*, — an attribute of its ownership, — one which goes to make up its essence and value. To take it away is practically to take his property away, and to do that is beyond the power even of sovereignty, except by proper proceedings to that end." (222 U.S. at 86; emphasis added.)

This recognition that total use preclusion without compensation is forbidden by the Fifth Amendment was recently confirmed in *First English*, 482 U.S. at 316-317, with this

Court taking as its text the following comment from another *Mugler* contemporary, *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178 (1872):

> "It would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use." (Emphasis, the Court's.)

Thus, to the extent it makes any sense to recognize an "exception" from the Constitutional command of compensation, this Court's cases have treated the "exception" as a narrow one. The holding sought by South Carolina would have the "exception" swallow — in fact, displace — the rule.

B. The Regulator Cannot be Permitted to Immunize Itself by Defining its Target as a Nuisance

An insidious aspect of the "nuisance exception" idea is that the governmental proponents of it generally arrogate to themselves the power to decide *whether* something is a nuisance. Here, for example, the South Carolina legislature purported to make "findings" that home construction is a nuisance and therefore could be prevented by fiat.

The potential for result-driven "findings" and subjective (even if unconscious) value judgements is unmeasurable. In a constitutional system, such as ours, the legislative branch cannot be given (or abdicated) the power to determine its own Fifth Amendment liability by the simple expedient of defining the target of its actions as a nuisance. Judicial

interposition, to determine the actuality of the "nuisance," is essential for the proper functioning of the Fifth Amendment's scheme. As the Claims Court has recently remarked, to accept the assertion that a particular activity *is* a nuisance merely because Congress chose to prohibit it is "circular reasoning" (*Florida Rock Indus., Inc. v. U.S.*, 21 Cl. Ct. 161, 168 [Cl. Ct. 1990]) which has "no benchmark of objectivity" (*Loveladies Harbor, Inc. v. U.S.*, 15 Cl. Ct. 381, 389-90 [Cl. Ct. 1988]) and which "would yield the destruction of the fifth amendment." (*Florida Rock*, 21 Cl. Ct. at 168)

In other contexts, this Court has refused to permit wordplay as a substitute for compliance with the Just Compensation Clause:

> "This Court has stated that a sovereign 'by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.' " (*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 [1984]; quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 [1980].)

Moreover, such deferential abdication to the legislative branch is contrary to this Court's general approach to takings cases. In *Agins v. City of Tiburon*, 447 U.S. 255, 260-261 (1980), for example, the Court explained that the "determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," and recognized that this question "necessarily requires a weighing of private and public interests." That essential "weighing" process in the Constitutional matrix cannot be accomplished by conclusively granting the governmental side the power to dictate the ground rules by defining targets of regulation as nuisances.

Examining this Court's precedents, the 9th Circuit Court of Appeals recently concluded that the balancing test required to determine whether there has been a taking mandates careful factual examination. That analysis seems equally apt in the context of permitting one litigant to define the terms of the dispute in such a way that its conduct is immunized, as several of the illustrative cases are "nuisance" taking cases. As the 9th Circuit explained:

> "To hold that a legitimate public interest alone precludes a taking without regard to the degree of private deprivation turns the Court's balancing of interests into a bright-line test for which there is no precedent. The Court's own disclaimers make this clear. *See, e.g., United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985) ('We have never precisely defined those circumstances' when governmental land-use regulations amount to a taking); *Penn Central Transp. Co.*, 438 U.S. at 124 (takings analysis involves 'essentially ad hoc, factual inquiries'); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ('no set formula to determine where regulation ends and taking begins'); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (takings determination is 'a question of degree — and therefore cannot be disposed of by general propositions')." (*McDougal v. County of Imperial*, 942 F.2d 668, 677 (9th Cir. 1991); parallel citations omitted.)

That excessive deference is not due the government's definitional efforts is borne out by *First English* and *Nollan*, in which this Court declared that the rights of property owners are to be protected by the judiciary against the "cleverness and imagination" of governmental word games (*Nollan* 483 U.S. at 841), even if that "lessen[s] to some extent the freedom and flexibility of land use planners and governing bodies of municipal corporations . . . ." (*First*

English, 482 U.S. at 321) The thought was further emphasized in *Nollan* when this Court concluded that the standard which the government must meet to successfully defend its actions is a stricter one than the "rational basis" test historically applied in due process cases. (483 U.S. at 834, fn 3)

Allowing government to define the terms in such a way that there is only one possible outcome to litigation does not comport with this Court's takings jurisprudence. It's not good sense either. It would provide government with a license to confiscate by definitional *ipse dixit*. What governmental entity could resist such a tempting way to balance its budget? A self-declared and self-fulfilling power to define constitutional liability and immunity is foreign to the Fifth Amendment. To adopt South Carolina's position would truly eliminate the Fifth Amendment's protection of property owners.

CONCLUSION

Good intentions are not enough. Neither is significant public benefit. In fact, the presence of both good intentions and substantial public benefit merely leads to the conclusion that the government is acting in an area appropriate for governmental conduct. Neither addresses the compensation question.

In *First English*, this Court may have believed that it had answered the question. There, with simple elegance, this Court held that the Fifth Amendment's Just Compensation Clause means precisely what it says: when there is a taking — regardless of the instrumentality of the taking — the Constitution demands compensation. Period.

South Carolina, like many of those who can be expected to appear as its *amici*, has not learned that lesson. It believes that it can, with constitutional impunity, enact stultifying regulations which have popularity with significant blocs of the voting public and harm only the interests of a

disorganized few. It cannot. The purpose of the Fifth Amendment was to stand as a shield against governmental overreaching even against unpopular targets.

One cannot improve on the straightforwardness of *First English*:

> ". . . government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation." (482 U.S. at 315; internal quotation marks and citation omitted.)

At bottom, that is all this case is about. As this Court reaffirmed that simple rule in *Preseault v. ICC*, 494 U.S. 1 (1990), so the facts at bench call for the same application.

These *amici* pray that the decision of the South Carolina Supreme Court be reversed.

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Respectfully submitted,

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